IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 932

WESLEY D. WHEEL, DEXTER R. WINTERS, HERBERT B. HAMMOND, JAMES WILLIAMS, CHRISTOPHER WRIGHT, EDGAR W. PETTS, JOSEPH A. MURRAY, and GEORGE R. PHILLIPS,

Petitioners,

v.

CHARLES S. THOMAS and WILLIAM M. BRADLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL W. BRADLEY
1625 Eye Street, N. W.
Washington, D. C.

EUGENE GRESSMAN
1700 K Street, N. W.
Washington, D. C.

Counsel for Petitioners

April 28, 1958

TABLE OF CONTENTS

	Page
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit	1
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	6
1. A novel and substantial question is raised as to the validity under the due process clause of the Fifth Amendment of the second proviso of Section 12 of the Veterans' Preference Act of 1944	6
2. A novel and substantial question is raised as to whether the challenged proviso of Section 12 is a legislative infringement of the power granted by the Constitution to the Executive	12
3. The foregoing constitutional questions are important in the administration of the civilian service of the federal government and vitally affect the employment of some two million employees of the federal government. The entire system of merit in government is at stake	14
4. In view of the substantial constitutional questions involved, the District Court erred in refusing to summon a three-judge court	18
Conclusion	20

TABLE OF AUTHORITIES

STATUTES:

5 USC Section 861, 58 Stat. 390	3
5 USC 2005, Section 6, 64 Stat. 1099	8
28 USC Section 1254(1)	2
28 USC Section 2282	18
28 USC Section 2284	19

Page

CODE OF FEDERAL REGULATIONS:

29 CFR Cumulative Supplement 1943, Section 624.4 4
32 CFR Cumulative Supplement 1943, Section 904.1 4

CASES:

Barthelmess v. Cukor, 231 N.Y. 435, 132 N.E. 140 .. 10
California Water Service Co. v. City of Redding, 304 U.S. 252, 255 19
Commonwealth ex rel., Graham v. Schmid, 333 Pa. 568, 3A. 2d 701 9
Gianatasio v. Kaplan, 284 U.S. 595 10
Gianatasio, Matter of, Court of Appeals 357 N.Y. 531, 178 N.E. 782 10
Hennen, ex parte, 13 Peters 230, 259 12
Humphrey's Executor v. United States, 295 U.S. 602 13
In re Summers, 325 U.S. 561, 571 7
Marbury v. Madison, 1 Cranch 137, 167 12
Myers v. United States, 272 U.S. 52 12
Ohio Bell Telephone Co. v. Public Utilities Commismission, 301 U.S. 292, 302 7
Parsons v. U. S., 167 U.S. 324 12
Poresky, ex parte, 290 U.S. 30 19
Slochower v. Board of Education, 350 U.S. 551 ... 7
Stratton v. St. Louis Southwestern R. Co., 282 U.S. 10, 15 19
United Public Workers v. Mitchell, 330 U.S. 75 6
United States v. Lovett, 328 U.S. 303 6
Wieman v. Updegraff, 344 U.S. 183 7

OTHER REFERENCES:

American Assembly, *The Federal Government Service*, (Columbia University, N.Y. 1954) 16, 17
Executive Orders 9139, 9279 4
Federal Personnel Manual, ch. R-3 4
Senate Report 2102, *Reduction-in-Force System in the Federal Government*, 82d Congress 2d Session (1953A) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

WESLEY D. WHITE, DOCTOR R. WINTER, HERBERT B. HAMMOND, JAMES WILLIAMS, CHRISTOPHER WRIGHT, EDGAR W. PITTS, JOSEPH A. MURRAY, and GEORGE R. PHILLIPS,

Petitioners.

v.

CHARLES S. THOMAS and WILBUR M. BRUCKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Wesley D. White, Doctor R. Winter, Herbert B. Hammond, James Williams, Christopher Wright, Edgar W. Pitts, Joseph A. Murray, and George Phillips pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 23, 1958.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the trial court, printed in Appendix A hereto, *infra*, p. 1a, is unreported. The opinion of the Court of Appeals, printed in

Appendix B hereto, *infra*, pp. 2a to 7a, is reported in .... F. 2d ..... It is not yet reported in the U. S. App. D. C. reports.

JURISDICTION

The judgment of the Court of Appeals was entered January 23, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether an Act of Congress which requires that no civil service employee having veterans' preference status may be discharged in a reduction-in-force so long as a civil service employee without such status is retained in a competing employment, is an arbitrary and unreasonable discrimination against such non-preference employees, and, if so, whether such discrimination violates the due process clause of the Fifth Amendment to the Constitution of the United States?

2. Whether the absolute requirement of the retention of an employee having veterans' preference, and the consequent prohibition of the consideration of any other factors, such as experience, skill, seniority, or efficiency by the executive officers, is a legislative infringement of the executive power, and therefore a violation of the doctrine of separation of powers?

3. Whether a single judge of a United States District Court exceeds his authority, as limited by 28 U. S. C., Section 2284, by refusing to summon a three-judge court and dismissing a suit instituted by federal employees to enjoin, upon the ground of unconstitutionality, the enforcement and operation of Sections 12 of the Veterans' Preference Act of 1944, the constitutionality of which has never been passed upon by this Court?

STATUTES INVOLVED

The statutory provision involved in this action is Section 12 of the Veterans' Preference Act of 1944 (5 U. S. Code, Section 861, 58 Stat. 390, Act of June 27, 1944), which provides as follows:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided:* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further:* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: * * *

STATEMENT

These suits were instituted by the petitioners, who sought injunctive relief against the threatened loss of their government employment as the result of the application of Section 12 of the Veterans' Preference Act of 1944, which statute the petitioners alleged to be unconstitutional and void. The cases were argued together and consolidated in the District Court [R., p. 31]. The single district judge denied the petitioners' application for the convening of a three-judge district court and dismissed the complaints [R., p. 31].

All of the petitioners are employed as civilian employees in military and naval establishments. All have civil service status.

The effect of the provision of Section 12 of the Veterans' Preference Act and its absolute requirement that employees with preference status be retained and that competing employees without such status be reduced-in-force is summarized in the following table:

Petitioner	Initial Employment	Job Title	Preference employees with fewer retention credits [1]
White	1929	Pipefitter	Not stated
Winter	3/2/1935	Leading Man Shipfitter	15
Hammond	4/28/1936	Leading Man Welder	4
Williams	5/1/1935	Laborer	36
Wright	4/20/33	Helper Machinist	36
Phillips	8/—/1936	Planner and Estimator	
Murray	18 years 10 months	Filer	8
Pitts	11/23/1926	Machining Inspector	47

Each of the petitioners had been employed at the respective establishments at the beginning of World War II. Each of them was, during the war periods, frozen in the essential employments in which he was engaged.[2] In the case of White, he had been drafted into the Navy and inducted [R., pp. 1, 4], but was immediately furloughed so that he could remain at his work at the Navy installations at Pearl Harbor. Phillips had, during the war, attempted to volunteer for the armed services, but was held by the War

[1] Retention credits are the numerical method of calculating the factors of seniority and performance. The Federal Personnel Manual, ch. R-3, "Reduction in Force," p. R-3-16, defines reduction credits as " • • • numerical credits given for length of Government service and for performance ratings. One credit is given for each full year of Government service; four credits are given for a current official 'outstanding' performance rating; • • •"

[2] 29 CFR, Cumulative Supplement, 1943, Sec. 904.1 *et seq.* 32 CFR, Cumulative Supplement, 1943, Sec. 624.4. Executive Orders Nos. 9139 and 9279.

Labor Board to be essential in his civilian work, and was refused permission to leave the New York Naval Shipyard so that he could volunteer [R., p. 18].

Each of the respondents admits [R., pp. 4, 10, 11, 13, 14, 27] that he has taken steps which affect the employment of the various petitioners, and asserts his intention of applying the provisions of the challenged section against the petitioners, and all employees similarly situated. The extent to which the statute has been applied in the individual cases varies with the various petitioners. All of them have been affected by the establishment of registers under which they cannot be retained in government employment in competition with employees having veterans' preference. Pitts and Murray have actually been discharged from their employment [R., pp. 15, 16]. Phillips has suffered a substantial reduction in grade and pay [R., p. 27], as has Winter [R., p. 24]. Hammond, Williams, and Wright received notices of termination, but these notices were cancelled after the institution of the actions in the District Court [R., pp. 25, 26].

The Government moved to dismiss each of the cases, and these motions were heard and determined by the single judge of the District Court [Appendix A., *infra*, p. 1a]. The trial court refused to summon a three-judge district court on the ground that there was no substantial issue as the constitutionality of the challenged section [R., pp. 30, 31], and dismissed the actions.

The Court of Appeals affirmed this ruling [R., p. 34] in a divided decision, Judge Prettyman dissenting.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case has decided important questions of federal law which have not been, but should be, decided by this Court. The questions of the constitutional validity of the second proviso of Section 12 of the Veterans' Preference Act of 1944 affect the employment of the entire personnel of the federal civil service, and petitioners submit that the decision of the Court of Appeals is an erroneous construction of the rights of federal employees and of the power of the Congress to infringe upon the prerogatives of the Executive. While the majority of the Court of Appeals found no substantial issue of constitutionality, the dissenting judge emphasized the importance of the question in this language (Appendix, *infra*, p. 7a):

> I would hope the Supreme Court will take this case, which lies in the "field of doubt" it forecast in the Humphrey's opinion. Dire results are predicted to us if the present peremptory proviso gradually causes the civilian service of the Government to be manned by veterans of substantially less qualifications than experienced non-veterans.

1. A novel and substantial question is raised as to the validity under the due process clause of the Fifth Amendment of the second proviso of Section 12 of the Veterans' Preference Act of 1944.

This Court has made it plain that the power of Congress over the conditions of federal employment, while broad, is not unlimited. It is likewise clear that, although governmental employment is still regarded as a "privilege", any person has a constitutionally protected right not to be excluded arbitrarily from governmental employment in violation of constitutional provisions. *United States* v. *Lovett*, 328 U. S. 303; *United Public Workers* v. *Mitchell*, 330 U. S. 75. The full effect of this principle has been made plain in

Wieman v. *Updegraff*, 344 U. S. 183, 191-192, where this Court said:

> * * * in United Public Workers, though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'' 330 US at p. 100. See also, In re Summers, 325 US 561, 571. We need not pause to consider whether an abstract right to public employment exists. *It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.* (Emphasis supplied.)

This principle was reiterated and reinforced in *Slochower* v. *Board of Education*, 350 U. S. 551, in which this Court prohibited the discharge of a public employee for an invalid reason. The *Slochower* decision placed the basis for the protection squarely within the due process clause. The Court there said (p. 559):

> There has not been "the protection of the individual from arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process. *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302.

It is on the grounds of arbitrary action within the meaning of the due process clause of the Fifth Amendment that the petitioners have challenged the validity

of the second proviso of Section 12 of the Veterans' Preference Act of 1944. That proviso reads:

> * * * *Provided further*, that preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *[1]

The effect of this provision is that any preference employee who can remain on the federal payroll has an absolute right to displace any competing non-preference employee, even one with the highest possible efficiency rating and even one with greater seniority, skill or merit.

As a result of the application of the foregoing proviso, two of the petitioners were discharged from the federal service, two have suffered substantial reductions in grade and pay, and the remainder are immediately threatened with the loss of their employment despite the fact that their skill and seniority, as measured by the retention credit system, are greater than those of the war veterans whose employment has not been affected. The petitioners lost, or are threatened with losing, their jobs simply because they lacked the preference accorded war veterans. And they lacked the status of war veterans because they had been employed in essential industries and establishments during World War II and were thereby precluded, by action of the government, from entering the armed forces and acquiring the essential veterans' status.

---

[1] This section was amended, *pro tanto*, by the Act of September 30, 1950, Section 6, 64 Stat. 1099, 5 U. S. C. 2005, to provide for only three ratings, "Outstanding", "Satisfactory" and "Unsatisfactory." An "Unsatisfactory" rating, after warning, requires the dismissal of the employee.

The unconstitutional arbitrariness adhering to the second proviso of Section 12 is evident from the fact that it plainly discriminates against those non-veteran employees who possess greater efficiency, seniority and merit than competing employees with veterans' preference. It adopts an arbitrary formula whereby former military service overrides every other consideration in the retention of public employees. As stated in *Commonwealth ex rel. Graham* v. *Schmid*, 333 Pa. 568, 3 A. 2d 701:

> . . . But, on the other hand, where war service is appraised beyond its value, and the preference goes beyond the scope of the actual advantages gained in such service, the classification becomes void and the privilege is held unreasonable and arbitrary. Public policy demands such a rule of law. It is essential to the administration of public affairs that governmental employees be selected on the basis of their ability to perform the duties imposed upon them in an efficient manner, and if public servants are not selected on this basis, the appointing power violates its oath of office; where the legislature so provides, it offends the constitutional mandate.

It should be noted that petitioners' challenge here does not involve a general attack upon all privileges and preferences accorded to veterans. The Veterans' Preference Act provides for certain point advantages upon a veteran's initial entry into governmental service. The first proviso of Section 12 provides for a consideration of veterans' status, along with other relevant facts, in determining which employee should be discharged. It affords a further advantage to the veteran by requiring that the time spent in military service, no matter how unrelated to governmental em-

ployment, be counted as a part of longevity. To this extent, the statute reaffirms the traditional preference of veterans. Of this the petitioners make no complaint. In the words of Mr. Justice Cardozo in *Berthelmess* v. *Cukor*, 231 N. Y. 435, 132 N. E. 140:[1]

> . . . [The Legislature] may say that military or naval service . . . is something to be counted by the examiners, like experience in other fields, . . . Service so considered does not override the results of competitive examination, but enters into the results as a contributory factor. A different situation arises when service controls selection, irrespective of qualifying value. It is the difference between an appraisal of merit, an estimate of fitness, and a preference or bonus.

Thus it is the situation "when [war] service controls selection, irrespective of qualifying value"—the situation which characterizes the second proviso of Section 12—about which the petitioners complain. It is that situation which caused the President's Commission on Veterans' Pensions, after a thorough study, to conclude:

> Preference in retention during reductions in force for non-disabled veterans has no real rela-

[1] The Court of Appeals relied upon *Matter of Gianatasio*, 357 N. Y. 531, 178 N. E. 782, appeal dismissed for want of a substantial federal question, *Gianatasio v. Kaplan*, 284 U. S. 595, as demonstrating that the present suit did not present a substantial constitutional question of discrimination. Considered in the light of *Berthelmess* v. *Cukor*, *supra*, it is clear that the *Gianatasio* case does not stand for the proposition that an arbitrary formula in which former military service overrides every other consideration is a valid exercise of the legislative power under the due process clause. Contrariwise, the New York rule is clearly in support of the petitioners' position that while a preference between equals is constitutionally acceptable, the retention of the veteran despite all other considerations is an arbitrary discrimination.

> tion to readjustment needs and does violence to the basic principles of the Federal merit system. The goals of open competition and equal treatment for all, on the basis of their ability to serve the public as employees, cannot be achieved if there is arbitrary discrimination in favor of one group based on factors having nothing to do either with their efficiency or with their readjustment needs as veterans.

The classification created by the second proviso of Section 12 is without reason or guiding principle. It creates two classes of governmental employees, the rights of one class being absolutely superior to the other. The classification depends entirely upon such fortuitous circumstances as time of birth, misfortunes of physical handicaps or the act of the government itself—the circumstances which determine whether one has a chance to acquire veterans' status. One does not achieve the preferred status by any act or failure to act over which he has any real control.

To say, as did the District Court, that this discrimination is justified as a bonus or pension is to distort the very nature of governmental employment. Such employment is not in any meaningful sense the equivalent of a bonus or pension or largess. And it is logically wrong to identify the grant of a pension with the privilege of absolute retention, irrespective of qualification, in the government service. Pensions and other grants are provided from public funds supplied by taxpayers generally; the burden thus imposed on any one citizen is undoubtedly *de minimis*. But the impact of the privilege of absolute retention of a war veteran falls directly upon the employee lacking veterans' status. Such an employee may, as did the petitioners here, lose his livelihood after long and honor-

able service in the government. The serious consequences that thus ensue are characteristic of an unconstitutional discrimination rather than of a bounty or bonus.

The precise constitutional issue thus raised is a substantial one that finds no definitive or controlling answer in the prior decisions of this Court. The discrimination created by the second proviso of Section 12 is so plain and so unwarranted as to make review by this Court necessary and appropriate. The principle that governmental employees are constitutionally protected against arbitrary and unreasonable discharges is too important to be ignored in light of the plain challenge contained in that second proviso.

2. A novel and substantial question is raised as to whether the challenged proviso of Section 12 is a legislative infringement of the power granted by the Constitution to the executive.

The Constitution provides that "The executive Power shall be vested in a President of the United States" (Art. II, Sec. 1, cl. 1) and authorizes Congress by law to vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments (Art. II, Sec. 2, col. 2).

The power of removal from office is, however, a matter which is completely different from the power of appointment. The Constitution, in fact, makes no mention of the power of removal. As to an executive officer, restricted to the performance of executive functions, the power of removal is implied from the power of appointment, and is necessarily an executive prerogative. *Myers* v. *United States*, 272 US 52. *Re Hennen*, 13 Pet. 230, 259; *Parsons* v. *United States*, 167 US 324; *Marbury* v. *Madison*, 1 Cranch 137, 167.

Notwithstanding the decision in *Humphrey's Executor* v. *United States*, 295 US 602, in which a different rule was enunciated with respect to a *quasi*-judicial officer, the power to remove an executive officer is that of the executive, and is a power necessarily implied from the constitutional duty of the President to "take care that the Laws be faithfully executed."

It is obvious that the President can not by himself enforce the laws, but must act through executive subordinates. From the responsibility flows the power to supervise the acts of these subordinates, and to remove those who are not competent. Likewise, when the number of such subordinates is required to be reduced from lack of funds or other reasons, the executive must exercise his discretion with respect to whom he will retain and whom he will discharge, for without the authority to exercise such discretion, the President cannot fairly be held to the responsibility for the faithful enforcement of the laws. It was the theory of the authors of the Constitution that this discretion would be exercised by the President on the basis of merit alone. In fact, James Madison suggested in the congressional debates of 1789 that the act of the President in removing a meritorious officer to effect his replacement by a less meritorious one would be an act of maladministration which would warrant the impeachment of the President.

The question then is, to what extent can Congress require the executive to dismiss a more qualified officer in order to retain a less qualified one? The constitutional principles which led to the determination in the *Myers* case, *supra*, that the removal of a purely executive officer was a purely executive function compel the conclusion that the discretion as to which of

two competing employees shall be removed is an executive responsibility, which must be exercised by the executive. An attempt by Congress to require the executive to disregard merit, or to prevent the exercise of the executive discretion, is at war with the fundamental doctrine of the separation of powers.

The mandatory language of Section 12 is designed to prevent the exercise of this executive discretion. As was noted by the dissenting judge of the Court of Appeals, the language of this section is the only language in any of the statutes relating to the civil service which is thus mandatory. All others are cast in the mold of advisory aids to the President. The advisory language is no impingement upon the executive power, since the ultimate discretion still reposes in the executive. Section 12, in its mandatory form, is such an invasion of the executive power. In unvarnished terms, it seeks to require the President to violate his oath of office by requiring him to retain officers of lesser competency—an act fundamentally at variance with his duty to take care that the laws are enforced.

Section 12 is necessarily an infringement of the executive power and is therefore unconstitutional. As such, it necessitates full consideration and deliberation by this Court.

3. The foregoing constitutional questions are important in the administration of the civilian service of the federal government and vitally affect the employment of some two million employees of the federal government. The entire system of merit in government is at stake.

The selection and retention of those best qualified for employment in the civil service positions in the executive department is a matter of grave concern to all citizens, as well as those who are more directly

concerned as government employees. Employees have a constitutional right to be protected against arbitrary exclusion from opportunities for retaining government employment. This right, because of the constantly increasing importance of government employment in our economic life, must be of increasing concern and judicial protection.'

Although since the close of the Civil War, those who had served in the armed forces were accorded a preference in government employment, it was not until the challenged Act of 1944 that the provision for the absolute retention of veterans became a part of the Civil Service system. The American Assembly, *The Federal Government Service*, p. 132 (Columbia University, New York 1954).

The number of government employees actually affected by this provision is of significance. Recent statistics of government employment show the number of government employees whose positions are jeopard-

---

[1] The govern..ent's importance as an employer almost doubled, from an arithmetical standpoint during the fifteen years between 1939 and 1954, as is shown by the following statistics:

Year	Total Civilian Employment (in thousands)	Government Employment (in thousands)	Ratio
1939	45,750	944	2.32
1944	54,630	3,342	6.13
1949	58,710	2,083	3.55
1954	61,228	2,494	4.06

Source of data: Statistical Abstract of U. S.

The increased importance of government employment because of the govern-ment's domination of certain crafts because of military production is not, of course, susceptible of measurement, but is a matter of ordinary daily observation.

ized by the enforcement of the absolute retention preference:

	Government Employees Continental U. S.		Veterans		Percent Veteran	
	Total (in thousands)	Male	Total (in thousands)	Male	Total	Male
1952	2,374	1,786	1,107	1,080	47	60
1953	2,193	1,663	1,059	1,034	38	63
1954	2,154	1,626	1,046	1,021	48	63
1955	2,152	1,639	1,056	1,031	50	63

Source of data: Statistical Abstract of U. S.

The increasing number of veterans, especially among the male employees of the federal government, makes it abundantly clear that the Act of 1944 is, in fact, the means of creating a monopoly for veterans in the government service, and will eventually result in the total exclusion of non-veterans from the government service. The constitutional validity of the exclusion from federal employment of more than half of the citizens of the United States is, we believe, a question of vital importance in the administration of the federal service.

> A principal reason for this trend upwards is undoubtedly the provisions for reduction in force. Fewer veterans are dropped. Probably also, fewer non-veterans are enticed into insecure jobs. * * *
>
> These trends may be compared with the increase of veterans in the total population. A rough comparison of the government with the society outside the government shows that already veterans' preference has had a disproportionate impact. Of the total labor force in the United States, veterans comprise about 30 per cent. Of the total force of the Federal Government, they comprise about 50 percent.
>
> —The American Assembly, *The Federal Government Service*, pp. 138, 139.

Although the importance of the question is substantial because of the impact on the individuals who, usually at an advanced age, are deprived of employment in which they have served efficiently for many years, even more important is the impact on the government service staff. No impartial organization which has studied the impact of this law during the last 18 years has failed to conclude that the proviso is damaging to the government. The American Assembly has said:

> Unquestionably the most serious current problem of preference arises from the procedure for Federal reductions in force. The resulting upsets have gone to the very fabric of agency organization and morale. It is doubtful that many private organizations have endured and survived such internal convulsions. * * * [The upsets] have shaken the morale and the feeling of security of thousands of other employees and the interest and faith in the government as employer among many thousands outside the government. Some of the best public servants have been fired or "bumped;" many others have voluntarily left the service; perhaps many thousands of others have been discouraged from seeking Federal employment. This situation has led the National Civil Service League to label veterans' preference as "perhaps the most serious obstacle in the way of efficient managing of Federal personnel today."
>
> —The American Assembly, *The Federal Government Service*, p. 139.

The same conclusion was reached by the Senate Post Office and Civil Service Committee after an exhaustive study of the effect of the Veterans' Preference Act of 1944. Its report stated:

> . . . The result is that Government is gradually losing many of its most experienced and highly

> skilled employees. Moreover, arsenals, ordinance laboratories and plants, and navy yards report that they cannot recruit skilled men for these positions, and former employees who have been laid off in reductions, will not return to Government employment as a consequence of this basic inequity in competing for retention. * * *
>
> —"Reduction-in-Force System in the Federal Government," Senate Report No. 2102, 82d Congress, 2d Session, p. 24 (1953A).

The questions of the constitutional validity of Section 12 of the Veterans' Preference Act of 1944 are important questions which should be determined by this Court, both because of the impact of the statute upon the more than one million federal civilian employees who do not have preference status, and because of its adverse effect upon the efficiency and morale of the civilian staff of the government and upon the conduct of the business of the government. This basic importance of the questions is of greater concern because, we believe, the decision of the Court of Appeals was erroneous in principle.

4. In view of the substantial constitutional questions involved, the District Court erred in refusing to summon a three-judge court.

A three-judge district court must be convened where, as here, an attempt is made to obtain an "interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States." 28 U. S. C. 2282. And where a three-judge court is thus necessary, a single judge is without jurisdiction to dismiss the complaint on the merits or to grant or deny an interlocutory or permanent injunc-

tion or to do anything else not specifically authorized by 28 U. S. C. 2284. *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 15.

It is essential to the proper invocation of the three-judge court procedure, of course, that the constitutional questions raised be substantial. *Ex parte Poresky*, 290 U. S. 30. "The lack of substantiality in a federal question may appear either because it is so obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 255.

The constitutional questions heretofore discussed demonstrate conclusively that they possess more than adequate substantiality so as to require the convening of a three-judge court. It cannot be said that the question of the arbitrariness of the discrimination against non-veteran government employees is so obviously without merit or its unsoundness so clearly demonstrated from past decisions of this Court as to foreclose the question. Nor can such conclusions be drawn as to the issue relative to the legislative invasion of the executive power, an issue that compelled one of the judges of the Court of Appeals to dissent from the majority's statement that the complaint failed to raise a substantial constitutional question.

It necessarily follows that the District Court erred in refusing to convene a three-judge court and that it lacked jurisdiction to dismiss the complaint. And the Court of Appeals erred in failing to correct this jurisdictional defect and to insist upon the utilization of the three-judge court procedure. *Stratton* v. *St. Louis Southwestern R. Co.*, *supra*. Further review by this

Court is thus essential so that the jurisdictional problems can be properly resolved.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL W. BERUEFFY
1625 Eye Street, N. W.
Washington, D. C.

EUGENE GRESSMAN
1700 K Street, N. W.
Washington, D. C.

Counsel for Petitioners

April 18, 1958